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F I L E D	FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE July 20, 2023 20 juillet 2023 Svetlana Dobrota	D É P Ô S É		
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**IN THE FEDERAL COURT OF APPEAL
IN THE MATTER OF THE CANADA LABOUR CODE, R.S.C., 1985, c. L-2**

BETWEEN:

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION - CANADA

Applicant

AND:

BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION

Respondent

APPLICATION UNDER THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: _____ Issued by: _____
(Registry Officer)

ADDRESS OF LOCAL OFFICE:

FEDERAL COURT OF APPEAL
Pacific Centre, P.O. Box 10065
701 West Georgia Street
Vancouver, BC, V7Y1B6

TO:

CANADA INDUSTRIAL RELATIONS BOARD
Western Regional Office
501- 300 West Georgia St
Vancouver, BC, V6B 6B4

AND TO:

BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION
349 Railway St
Vancouver, BC, V6A 1A4

AND TO:

THE ATTORNEY GENERAL OF CANADA
Department of Justice Canada (BC Regional Office)
900 – 840 Howe Street
Vancouver, BC, V6Z 2S9

APPLICATION

1. This is an application for judicial review of the July 19, 2023 order of the Canada Industrial Relations Board Order No.: 1460-NB (“Order No.: 1460-NB”).
2. The Applicant International Longshore and Warehouse Union Canada (the “ILWU”) represents twelve autonomous local unions and is the bargaining agent for approximately 7000 longshore workers in British Columbia who are in a province-wide voluntarily recognized bargaining unit (the “Bargaining Unit”).
3. The Respondent British Columbia Maritime Employers Association (BCMEA) represents maritime employers in British Columbia and bargains with the Applicant on many of those employers’ behalf.
4. The ILWU and BCMEA Collective Agreement which applies to the Bargaining Unit expired on March 31, 2023.
5. On November 30, 2022, the Respondent gave notice to commence collective bargaining for a renewal collective agreement.
6. The parties collectively bargained until reaching an impasse in March 2023, at which point the Applicant filed a Notice of Dispute, triggering conciliation under the *Canada Labour Code*, R.S.C., 1985, c. L-2 (the “Code”).
7. The parties continued to collectively bargain from March 2023 onwards with the assistance of the Federal Mediation and Conciliation Services (“FMCS”), including senior mediator Peter Simpson, Director of FMCS.
8. On June 28, 2023, after the parties reached impasse in bargaining, the Union gave strike notice, stating the strike would commence on July 1, 2023, at or about 8:00 a.m.
9. On July 1, 2023, at 8:00 a.m., the Union commenced its strike (the “Strike”) by establishing picket lines and withdrawing labour at most BCMEA member terminals.

10. During the strike, Union workers have continued to provide services for grain shipments and cruise ship passengers and the parties have continued to collectively bargain.

11. On July 11, 2023, the Minister of Labour (the “Minister”) informed the Applicant and the Respondent by letter that he had asked the senior federal mediator to provide him with terms of a recommended settlement for a renewal collective agreement (the “Recommendations”), pursuant to subsection 105(2) of the *Code*, within 24 hours.

12. On July 12, 2023, the Minister provided the Recommendations to the Applicant and the Respondent, gave each of them twenty-four hours to communicate to the Minister their willingness to recommend these terms for ratification by their principals, and made the following request:

Should the recommended terms be acceptable to both parties, I would additionally ask, as a sign of good faith, that the union suspend its strike while the voting process unfolds, and further, that the employer agree that no lockout will be imposed.

13. On July 13, 2023, Rob Ashton, President of ILWU Canada, responded to the Minister that the ILWU Longshore Bargaining Committee would recommend to the ILWU Longshore Contract Caucus to send the Recommendations to the Applicant’s membership.

14. The ILWU Canada Longshore Bargaining Committee is composed of the President and approximately 12 elected ILWU members including local presidents who report to the ILWU Longshore Contract Caucus.

15. The ILWU Longshore Contract Caucus is composed of approximately 70 ILWU members elected as representatives by the local unions for the purpose of directing collective bargaining.

16. On July 13, 2023, at approximately 11:00 am after writing to the Minister and in a gesture of good faith, the Applicant made the unilateral decision to take down its picket

lines. The ILWU Longshore Bargaining Committee recommended to the ILWU Longshore Contract Caucus that it provide the Recommendations to the membership to ratify.

17. At no time did the Applicant advise the Respondent or the Minister that the Strike was ended or that ILWU would not continue picketing if the voting process did not result in ratification.

18. At no time did the Minister or the Respondent seek agreement from the Applicant that it give notice prior to raising the picket lines again, and no such agreement was ever made.

19. Some, but not all, of the Applicant's members chose to return to work when the picket lines came down and attended work starting on or about July 14, 2023.

20. On July 18, 2023, after 2 days of deliberations, the ILWU Longshore Contract Caucus voted and rejected the recommendation of the ILWU Longshore Bargaining Committee to provide the Recommendations to the membership for Ratification. The ILWU Longshore Contract Caucus believed that the ILWU could achieve a better settlement if the strike activity continued.

21. On July 18, 2023, at approximately 3:30 pm, the ILWU provided notice to the Respondent and Minister that it would resume strike activity. At approximately 4:30 p.m., the Applicant raised its picket lines again. The employees represented by the Applicant respected the picket lines and employees who had previously chosen to go to work withdrew their labour.

22. On July 18, 2023, at or around 5:15 p.m., the Respondent e-mailed an application alleging that the Applicant was illegally on strike (the "Application") to the Canada Industrial Relations Board (the "CIRB").

23. On July 18, 2023, at 5:26 p.m., the CIRB contacted the Applicant's counsel by phone and advised that there would be a case management conference at 6:00 p.m.

24. On July 18, 2023, at 6:00 p.m., the CIRB held a case management conference, chaired by the Chair of the CIRB.

25. On that case management call, at or around 6:35 p.m, counsel for the Applicant advised the Chair that the Applicant needed more time to prepare and asked that the CIRB commence a hearing of the Application the following morning. The CIRB advised the Applicant that the hearing would commence at 9:30 p.m.

26. The Applicant and their counsel prepared in the less than 3 hours between that advice and the hearing, but did not have sufficient time to adequately collect, review, and lead evidence, and to prepare legal argument.

27. The hearing started at 9:30 p.m. on July 18, 2023, and ended at or around 1:30 a.m. on July 19, 2023.

28. At the hearing, the Respondent took the position that the Applicant's strike had ended, and that the raising of the picket lines and strike activity occurring on July 18, 2023 was a “new” strike, requiring new notice under Section 87.2(1) of the *Code*.

29. The Applicant took the position, *inter alia*, that the Board was required to interpret the *Code* in light of the values underlying the *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 (the “*Charter*”), including those underlying the right to collective bargaining and to strike guaranteed by Section 2(d) of the *Charter*, that the Strike had not ended, that the jurisprudence did not require the continuation of job action in order for the Strike to be ongoing, and that the existence of a picket line does not determine the existence of a Strike.

30. On July 19, 2023, at 7:32 a.m., the CIRB issued Order No.: 1460-NB. Order No.: 1460-NB set out the CIRB's determination that a 72-hour notice of strike was required prior to commencing strike activity on July 18, 2023, declared that an unlawful strike occurred when the Applicant commenced strike activity on July 18, 2023, and made the following orders at (a) through (d):

(a) that the longshorepersons represented by the respondent union and employed by the employers represented by the BCMEA, cease and desist from participating in strike activities until the requirements of section 89(1)(f) of the *Code* have been met;

(b) that the union revoke the declaration or authorization of strike activity and give notice of such revocation forthwith to the employees to whom it was directed;

(c) that any member of the union who is participating in strike activity immediately perform the duties of their employment as per the collective agreement and applicable dispatch rules;

(d) that the union, its officers or representatives give immediate notice of this order and its content to any employee to whom it applies.

31. The effect of Order No.: 1460-NB was that the Applicant was required to immediately discontinue strike activity and reissue strike notice to resume strike activity on July 22, 2023.

32. The CIRB substantially interfered with the collective bargaining process and the Applicant's rights under Section 2(d) of the *Charter* by preventing the Applicant from placing economic pressure on the Respondent through the lawful use of job action at a critical point in their labour dispute.

THE APPLICANT MAKES APPLICATION FOR:

1. An order that Order No.: 1460-NB be quashed in its entirety.
2. A declaration that the *Code* did not require the Applicant to give 72-hour notice of its July 18, 2023 strike activity.
3. A declaration that the strike activity on July 18, 2023 was a lawful continuation of the Strike.
4. A declaration that Order No.: 1460-NB interfered with the Applicant's ability to engage in collective bargaining by removing its ability to continue the Strike without new notice.
5. Costs of the Application.

6. Such further relief that counsel may advise or that the Court deems appropriate.

THE GROUNDS FOR THE APPLICATION ARE:

1. The Board failed to observe natural justice and procedural fairness when it ordered that the hearing proceed on July 18, 2023 at 9:30 p.m.
2. The Board acted without jurisdiction or beyond its jurisdiction in making its determination, declaration and orders as set out in Order No.: 1460-NB.
3. The Board erred in law and made an unreasonable decision in making its determination, declaration and orders as set out in Order No.: 1460-NB.
4. The Board erred unreasonably in its interpretation of the *Code*, including reading additional words into the *Code* unsupported by the wording or the purpose of the relevant provisions.
5. The Board erred unreasonably in failing to interpret and apply the *Code* in a manner consistent with the *Charter*.
6. The Board erred unreasonably in failing to follow its jurisprudence that a strike does not end with a change in strike activity, including a resumption of work.
7. The Board erred unreasonably in finding that the strike terminated when the picket lines came down and that a new notice of strike was required.
8. The Board erred unreasonably in finding that the strike required continuous picketing activity.
9. The Board erred unreasonably in finding that the *Code* required strike notice to specify what specific strike activity would be commenced by the union.
10. The Board erred unreasonably in finding that the Applicant had represented to the Respondent and/or the Minister that it would give fresh strike notice before raising its picket lines again.

11. The Board erred unreasonably in finding that the Minister's request to the Applicant to suspend a strike during a voting process amounted to a request to end the strike.
12. Any further grounds as counsel may advise.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. Affidavit material to be served and filed in accordance with s. 306 of the *Federal Courts Rules* (SOR/98-106), including the evidence provided and the submissions made to the Board in the course of the hearing.
2. The record before the Board.
3. Any further materials that counsel may advise or that the Court deems appropriate.

The applicant requests the Canada Industrial Relations Board to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Canada Industrial Relations Board to the applicant and to the Registry:

1. The full record of all material before the Board relating to Order No.: 1460-NB.
2. Any other documentation or information considered by the Board in reaching the decisions in Order No.: 1460-NB.

Date: July 20, 2023



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